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No. _____

In The

Supreme Court of the United States

October Term, 1994

STEVE NAKAMURA, Albuquerque Police Department Officer, and JOHN DOE 1 THROUGH 5, Five Albuquerque Police Department Officers,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should exercise its supervisory power to safeguard the "rational accommodation" of public policy and constitutional interests created by *Garrity v. New Jersey*, 385 U.S. 493 (1967) and its progeny and threatened when an unsupervised grand jury issues a subpoena demanding full disclosure of the Internal Affairs statements of police officers, made following promises given pursuant to *Garrity*.

LIST OF INTERESTED PARTIES

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OPINIONS BELOW

The orders of the United States District Court for the District of New Mexico are not published. They are attached hereto as Appendix (App.) 22-30.

The opinion of the United States Court of Appeals, Tenth Circuit, was issued on November 21, 1994 and is published as *In re Grand Jury Subpoenas Dated December 7 and 8, Issued to Bob Stover, Chief of Albuquerque Police Department v. United States of America*, 40 F3d 1096 (10th Cir. 1994) and attached hereto as App. 1-21.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals, Tenth Circuit, under 28 U.S.C. §1254(i) (1993) and Supreme Court Rule 10.1(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provision of the Fifth Amendment of the United States Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The case also involves the federal courts' supervisory powers over the grand jury, pursuant to 18 U.S.C. §3321 *et seq.* (1985, Supp. 1994) and Federal Rule of Criminal Procedure, Rule 6.

STATEMENT OF THE CASE

A. Statement of the Facts

In the early morning hours of January 27, 1989, marked police cars driven by Officer Steve Nakamura and other Albuquerque Police Department (APD) Officers chased a car driven by Peter Klunck at high speeds through the streets of Albuquerque. A warrant had been issued for Klunck's arrest as a probation violator and for new charges. Klunck's car ran off the road. Klunck was shot and killed by APD officers at the scene.

Nakamura and the five unnamed police officers were members of the Albuquerque Police Department at the time of the Klunck shooting. All six officers (hereafter "Officer" or "Officers") are still employed by APD. Each was present at the scene of the Klunck shooting or involved in the investigation immediately after the shooting.

In the weeks and months that followed, APD's Internal Affairs Unit (IAU) conducted an investigation of the shooting. During the course of that investigation, statements were taken from the Officers'. At the onset of each Internal Affairs interview, the Officer was informed that his or her statement "cannot be used in criminal court against you." Those statements are routinely given in the context of APD Internal Affairs Investigations and are known as "Garrity warnings" in recognition of the landmark case of *Garrity v. New Jersey*, 385 U.S. 493 (1967) (hereinafter *Garrity*). Specifically, IAU advised each Officer that "you are compelled to truthfully answer our questions in this investigation" and "if you refuse to answer, disciplinary action will be initiated against you."

In effect at the time was APD Standard Operating Procedure §3-43-10, "Compliance with Lawful Orders." It provided that "Personnel will comply with all lawful orders for information, materials, or assistance when such orders are made by the investigator of a complaint" and that "personnel must, as a condition of continuing employment, truthfully answer any and all questions relating to the matter under investigation regardless of whether they are a participant or a witness to the matter."

In May of 1993, the Albuquerque Office of the Federal Bureau of Investigation (FBI) requested that APD Chief Bob V. Stover disclose the IAU Investigation. Chief Stover refused to turn over the Internal Affairs files. The government ultimately followed up the FBI's oral request with a grand jury subpoena issued December 8, 1993 to Chief Bob Stover for a "complete copy of the internal affairs report regarding the shooting and subsequent death of Peter Klunck."

Chief Stover, through the Albuquerque City Attorney's office, continued to resist the subpoena and filed a Motion to Quash with accompanying Memorandum on December 10, 1993. On December 13, 1993, presiding District Judge Juan G. Burciaga ordered that Chief Stover be allowed to file any challenges to the subpoena duces tecum no later than December 27, 1993. On December 27, 1993 Chief Stover filed an Amended Motion to Quash or Modify Subpoena Duces Tecum with supporting Memorandum. Chief Stover pointed out that the IAU files contained copies of the compelled interviews of fifteen police officers who were given advisories under *Garrity*, before the interviews began. The Internal Affairs file also

contained an investigative synopsis which discussed those *Garrity* statements.

Chief Stover described that IAU investigations are proceeded by a criminal investigation, handled by investigators trained in major crime investigations. The criminal investigation report had been disclosed to the FBI, without subpoena. Upon the completion of the criminal investigation, the IAU receives a copy of the criminal investigation report which then becomes part of the IAU file. The IAU investigation is an important internal police function, permitting APD to make immediate decisions about supervisory issues and whether to permit officers to continue in the field. Statements taken after a *Garrity* advisement enable Internal Affairs investigators to obtain an early, accurate and candid narrative of what occurred.

Chief Holguin is the supervisor of the IAU. He described the APD policy of confidentiality to bar the disclosure of the Internal Affairs statements without a waiver from each officer "unless so ordered by a court which has reviewed and considered the privilege issue." He warned that the release of Internal Affairs statements will hamper future investigations by ending the APD officers' faith in the privileged nature of their compelled statements. "Should they [Officers] ever get the feeling that compelled statements may be used against them in a potential criminal matter, officers may think twice about being truthful."

The evidence presented by Captain Holguin made clear that disclosure of IAU files would jeopardize the very integrity of IAU investigations:

> We rely on officers to be truthful when confronted by Internal Affairs. Should they even get the feeling that compelled statements may be used against them in a potential criminal matter, officers may think twice about being truthful. The assurance that the matter will go no further is extremely important. The department has a duty to ensure that acts of misconduct are fairly and adequately investigated. . . . officers want and need the assurance that being truthful in an administrative investigation will not cause them harm outside the internal disciplinary environment. It would be a shame to see the present attitude change from telling the truth and facing discipline to coloring the facts for fear of potential criminal and civil sanctions.

Attached to Chief Stover's Amended Motion is the affidavit of Billy Pounders, President of the Albuquerque Police Officers' Association. He described the fact that witness police officers are compelled to give detailed accounts of incidents involving a shooting under Procedural Order 2-31-11. Union President Pounders pointed out that officers may not refuse to answer questions specifically and narrowly directed to their duties and "any refusal would result in automatic termination." Officers are not entitled to the presence of counsel during questioning by IAU investigators. He further pointed out that:

1. Investigative files sometimes contain statements taken from non-officer witnesses who wish to remain anonymous.

2. That compelled statements from witness police officers are used to make detailed reports of incidents

involving the use of deadly force resulting in death or great bodily harm. The ability to compel those statements enables the police department to make a prompt determination as to whether the officer involved should be removed from service.

3. Disclosure of Internal Affairs files hamper the ability of police administrators to obtain full and candid reports from officers.

4. That police officers "would be encouraged not to fulfill their duty to fully investigate internal complaints, if the results were discoverable." Union President Pounders concluded that the disclosure of statements given to IAU by witness police officers would have a "chilling effect" on an officer's willingness to give full and candid reports.

The government responded on December 30, 1993. In part, the government argued that only two of the fifteen officers interviewed by IAU were possible targets of the grand jury and that, "[a]s to the 13 non-targeted officers, *Garrity* is inapplicable."

On January 7, 1994, the District Court entered its order denying Chief Stover's Amended Motion to Quash or Modify the Subpoena Duces Tecum. No hearing had been conducted by the District Court.

On January 10, 1994, Chief Stover moved for a stay of the order.

On January 11, 1994, APD Police Officer Steve Nakamura moved to intervene as a real party in interest and requested a stay and reconsideration of the District Court's order. Officer Nakamura pointed out that Chief

Stover now would do nothing more to resist the disclosure of Nakamura's compelled Internal Affairs statements. Police Officer Nakamura argued, *inter alia*, that *Garrity* and its progeny protected the disclosure of his Internal Affairs statement and required the Court to limit and supervise the disclosure of the IAU file.

The five APD police officers, John Doe 1 through 5, filed a similar motion on that same day. They indicated that Chief Stover had informed them that he would comply with the Court's order of January 7.

That same day the District Court denied Chief Stover's Motion for Stay of Order. Upon the denial of that Motion for Stay, Chief Stover did nothing more to resist the disclosure of the IAU file, which included the Officers' Internal Affairs statements.

On January 12, 1994, again without a hearing, the District Court denied the Officers' Motions to Intervene as Real Party in Interest, Stay and Reconsider the Disclosure Order of January 7, 1994.

On January 18, 1994, the Officers timely filed their notices of appeal to the United States Court of Appeals, Tenth Circuit. The Tenth Circuit denied the officers' appeal on November 21, 1994. (App. 1).

B. Procedural History

1. District Court

The United States District Court for the District of New Mexico had subject matter jurisdiction over the proceedings below by virtue of its supervisory power over federal grand juries. 18 U.S.C. §3321 *et seq.* and Fed. R. Crim. P. 6. On January 7, 1994, the District Court denied Albuquerque Police Department (APD) Chief Bob Stover's Amended Motion to Quash or Modify Subpoena Duces Tecum, which sought to prevent the disclosure to a federal grand jury the Officers' compelled Internal Affairs Statements. (App. 22-26). On January 11, 1994, the Officers filed motions to intervene and for reconsideration claiming that the Internal Affairs statements were privileged under *Garrity v. New Jersey*, 385 U.S. 493 (1967). The Officers' motions were denied without a hearing on January 12, 1994. (App. 27-30).

2. Tenth Circuit Court of Appeals

The United States Court of Appeals, Tenth Circuit, had jurisdiction to review the orders of the District Court pursuant to *Perlman v. United States*, 247 U.S. 7 (1918). Chief Stover informed the Officers before they filed their intervention motions that he would comply with the subpoena duces tecum and disclose the Officers' Internal Affairs Statements to the grand jury. The Officers, therefore, had standing to appeal because Chief Stover produced the privileged material rather than risk contempt. *In re Grand Jury Proceedings, Company X*, 857 F2d 710 (10th Cir. 1988) *cert. denied*, 429 U.S. 905 (1989); *In re Grand Jury*

Proceedings, Vargas, 723 F2d 1461 (10th Cir. 1983), *cert. denied*, 469 U.S. 819 (1984) (hereinafter *Vargas*).

On November 21, 1994, the Tenth Circuit published its opinion holding that the Officers had standing to bring their appeal and that the facts of the case did not render the appeal moot. (App. 7-10). The Court then denied the Officers' appeal on the merits holding that the protections already in place pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972) provided an adequate remedy for any violations of the police officer's Fifth Amendment rights. (App. 18-19).

REASONS THE COURT SHOULD GRANT THIS WRIT OF CERTIORARI

This case presents the important and unanswered question of whether the federal judiciary should exercise its supervisory power at the grand jury stage to safeguard the integrity of Internal Affairs Investigations and the *Garrity* rights of police officers, where an overzealous prosecutor has issued a subpoena demanding full disclosure of the officers' officially coerced Internal Affairs statements. Without immediate intervention by this Court such unsupervised grand jury subpoena practices threaten to undermine the vitality of the *Garrity* doctrine.

I.

WHETHER OR NOT POLICE OFFICERS ARE TARGETS OF A CURRENT GRAND JURY INVESTIGATION, PROCEDURAL SAFEGUARDS AT THE GRAND JURY STAGE ARE NECESSARY TO PROTECT THE "RATIONAL ACCOMMODATION" OF POLICY INTERESTS AND CONSTITUTIONAL LIBERTIES CREATED BY THIS COURT IN *GARRITY* AND ITS PROGENY.[1]

INTRODUCTION

When police officers are questioned by IAU investigators about police criminal misconduct, they are forced at the risk of losing their job to answer potentially incriminating questions. This Court has described their

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[1] The government incorrectly argued below that the Officers were precluded on appeal from requesting procedural safeguards at the grand jury stage because they never specifically requested such relief at the District Court level. The Tenth Circuit acknowledged that Officer Nakamura requested the District Court to "limit and supervise the grand jury's use of the internal affairs files." (App. 5). However, at a later point in its opinion it appeared to accept the government's position. (App. 19 n.10). In fact, the Officers did everything they could to alert the Court to the violations of their *Garrity* rights and their position that the *Garrity* doctrine required that the subpoenas be quashed. Officer Nakamura specifically raised the *Garrity* privilege and requested the Court "to exercise some control over the use of coerced statements and ensure that Officer Nakamura's Fifth Amendment rights are protected." The five unnamed officers raised the same legal issues, requested that the subpoena be quashed, and requested a hearing. The law has never required that each procedural suggestion to enforce legal rights violated below be proposed first to the District Court. *See In re First Nat'l Bank, Englewood, Colo.*, 701 F.2d 115, 118-119 (10th Cir. 1983).

dilemma as a choice "between the rock and the whirlpool." *Garrity*, 385 U.S. at 498. In recognition of this tension between a police officer's constitutional rights and the public's need for prompt detection of police misconduct, the Court created a "rational accommodation" of public policy interests and constitutional rights in *Garrity* and its progeny. Today, police officers are told that they must truthfully answer IAU questions and that their answers may result in the loss of their jobs. The officers are also told that their answers cannot be used against them in any criminal proceeding. *Id.* at 500; *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

The blanket disclosure of police officers' Internal Affairs statements, pursuant to an unsupervised grand jury subpoena, chills the officers' willingness to participate in good faith with the IAU process and undermines the effectiveness of IAU investigations into police misconduct. Instead of strengthening police accountability this unchecked grand jury subpoena power undermines it. After exposure to such tactics, officers view with suspicion IAU assurances that their potentially incriminating Internal Affairs statements cannot be used against them in subsequent criminal proceedings. Ironically, this lack of safeguards threatens to undermine the ability of police officers to police themselves. As the affidavits of Captain Holguin and the president of the Albuquerque Police Officers' Association, demonstrate, "[s]hould they (the Officers) even get the feeling that compelled statements will be used against them in a potential criminal matter, officers may think twice about being truthful. The

assurance that the matter will go no further is extremely important."

Such unsupervised government tactics erode the "rational accommodation" of interests *Garrity* and its progeny were designed to protect. In order to prevent further erosion of the *Garrity* doctrine, it is time for the Court to revisit *Garrity* and establish procedural safeguards for use by district courts where a grand jury subpoena requests full and unsupervised disclosure of police officers' Internal Affairs statements.

A. Historically, this Court has Exercised its Supervisory Power to Protect the Disinterested and Neutral Administration of Criminal Justice.

"The history of liberty has largely been the history of observance of procedural safeguards," and historically this Court had taken an active role in safeguarding the disinterested administration of criminal justice where an overzealous branch of law enforcement threatens to erode "liberties deemed fundamental by the Constitution." *McNabb v. United States*, 318 U.S. 332, 347, 339 (1943). This power is premised on the Court's inherent ability "to formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983).

In *McNabb*, this Court exercised its supervisory power over the rules of evidence to prevent the introduction of confessions obtained from defendants who had not first been taken for presentment before a judicial officer, as required by federal law. *McNabb*, 318 U.S. at 345. Writing for the Court, Justice Frankfurter eloquently

explained the policy interests behind the Court's decision to exercise supervisory control:

> The purpose of this impressively persuasive requirement of criminal procedure [presentment before a judicial officer] is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary.

McNabb, 381 U.S. at 343.

Like *McNabb*, this case presents a classic example of overreaching by an unsupervised and overzealous arm of law enforcement, the grand jury prosecutor, and cries out for the Court's intervention. All too often allegations of police misconduct are accompanied by publicity and its corollary pressure upon the government to find and prosecute corrupt police officers. Where, as here, the government's reputation is at stake, prosecutors play fast and loose with the subpoena power of the grand jury, risking damage to the police officers' individual constitutional rights as well as to the efficiency and reliability of the IAU investigation process. In pursuit of criminal misconduct within the Albuquerque Police Department, the grand jury prosecutor subpoenaed the Internal Affairs

statements of the Officers without any regard for the *Garrity* doctrine or the integrity of the IAU investigations.

This Court cannot ignore the damaging, *immediate* harm done by such unrestrained and unsupervised governmental practices. To protect against the unbridled tyranny of an unsupervised arm of law enforcement in its overzealous pursuit of crime, district courts should be required to provide supervision of grand jury subpoenas demanding full disclosure of Internal Affairs statements made by police officers following *Garrity* warnings.

B. Procedural Safeguards are Necessary to Protect the Vitality of the Jurisprudence Developed by this Court in *Garrity* and its Progeny.

Prior to this Court's decision in *Garrity*, police officers were routinely required to waive their Fifth Amendment rights as a condition of employment. It was considered a public employee's duty to provide information pertinent to his office. He thus relinquished the right to conceal such information behind the Fifth Amendment privilege. *Christal v. Police Commissioner*, 33 Cal. App. 2d 564, 92 P.2d 416 (1939); Warnken, *The Law Enforcement Officer's Privilege Against Compelled Self-Incrimination*, 16 U. Balt. L. Rev. 452 (1987) (hereinafter, Warnken). In the 1960's two major changes in the law brought a measure of protection to the Fifth Amendment rights of police officers and other public employees. First, the Court incorporated the Fifth Amendment privilege against self-incrimination to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). Second, the Court decided *Garrity v. New Jersey*.

In a series of decisions following *Garrity*, the Court applied the same Fifth Amendment principles to a broad range of public employees, public contractors and others subject to regulatory and licensing authority. *Uniformed Sanitation Men v. Comm'r of Sanitation of City of New York*, 392 U.S. 280 (1968) (Sanitation Workers); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (architects); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (officers of a political party). In each instance, government officials argued that various state interests outweighed the interests accommodated by the Court's decision in *Garrity*: the interest in an honest law enforcement (*Garrity, Gardner*); the interest in an honest bar (*Spevak v. Klein*, 385 U.S. 511 (1967)); the interest in an honest civil service (*Uniformed Sanitation Men, Turley*); the interest in the integrity of the political system (*Cunningham*). In each instance, the Court declared that none of these interests justified infringement of the Fifth Amendment privilege against self-incrimination. *Lefkowitz*, 431 U.S. at 808 (opinion by J. Burger, "this Court did not permit those interests to justify infringement of Fifth Amendment rights in *Garrity, Spevak, Gardner*, and *Sanitation Men*"); Warnken, *supra* at 474.[2] In *Lefkowitz v. Turley*, this Court stated that these decisions represent a "rational accommodation" of the "well-recognized policies behind the privilege against self-

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[2] While the Supreme Court's position on this difficult issue has been quite clear, lower court enforcement has proven to be uneven. The uneven approach to the *Garrity*-type case stems from two problems: the failure of courts to recognize that the Fifth Amendment is implicated and some very unfortunate use of the Court's language in *Gardner v. Broderick*, 392 U.S. 273 (1968).

incrimination [] and the need of the state, as well as the Federal Government, to obtain information to 'assure the effective functioning of government.' " 414 U.S. 80, 83 (1973) (citations omitted).

Once again, this "rational accommodation" is under assault. Pursuant to *Garrity*, APD had the right to force the Officers to provide information regarding the events leading up to Paul Klunck's death. Moreover, APD could compel full disclosure by threatening to discharge the Officers if they refused to provide that information. This official coercion is sanctioned by the Constitution but it is counter-balanced by the clear rule, discussed with the Officers, that their Internal Affairs statements could not be used against them in any subsequent criminal proceedings. *See Gardner*, 392 U.S. at 278. In light of the protections guaranteed the Officers by *Garrity* and its progeny, the District Court's refusal to supervise the disclosure of the Officers' Internal Affairs statements was tantamount to causing a violation of the Fifth Amendment to transpire in the grand jury's presence. Such unsupervised disclosure runs contrary to the clear mandate of this Court and should not be accepted. *See Garrity*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

C. Federal Courts have Traditionally Exercised Supervisory Control to Prevent Prosecutorial Abuse of the Grand Jury Process.

Traditionally, federal courts have exercised their supervisory power over the grand jury process to prevent prosecutorial abuse. *First Nat'l Bank of Tulsa v. United States Dept. of Justice*, 865 F2d 217, 219 (10th Cir. 1989);

United States v. Kilpatrick, 821 F2d 1456, 1465 (10th Cir. 1987), *judgment aff'd sub nom, Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). Courts have utilized their power of supervisory oversight to enjoin prosecutors from using subpoenas in order to conduct private interviews in their offices, *Durbin v. United States*, 221 F2d 520 (D.C. Cir. 1954), from using documents made to look like subpoenas to force reluctant witnesses to come for interviews in their office, *United States v. Thomas*, 320 F2d 527, 529-30 (D.C. Cir. 1970), and from using grand jury subpoenas to prepare for trial, *United States v. Doss*, 545 F2d 548 (6th Cir. 1976). Such abuses constitute a perversion of the grand jury's constitutional and historic function. *Id.*; *see also In re Melvin*, 546 F2d 1 (1st Cir. 1976). *United States v. Hilton*, 534 F2d 556 (3rd Cir.), *cert. denied*, 429 U.S. 828 (1976).

When protecting a non-constitutional common law privilege, courts have gone even further in endorsing the district courts' supervisory role over the functioning of the grand jury. For example, where the attorney-client privilege is claimed by a grand jury witness the Tenth Circuit requires the district court to determine whether the attorney-client communication at issue was made to further a crime (thereby exempting it from the privilege) before ordering disclosure. *In re September, 1975 Grand Jury Term*, 532 F2d 734, 737 (10th Cir. 1976); *see also Vargas*, 723 F2d at 1467.

Where a grand jury subpoena threatens to infringe a constitutional right, the Tenth Circuit has required the government to justify the chilling effect on those rights resulting from compelled disclosure by demonstrating a

compelling interest in the information sought and a substantial relationship between the information and legitimate government goals. *In re First Nat'l Bank, Englewood, Colo.*, 701 F2d at 117, *citing NAACP v. Alabama*, 357 U.S. 449, 461-463 (1958). *In re First Nat'l Bank* involved a grand jury subpoena duces tecum served on a bank. The subpoena directed disclosure of records pertaining to groups opposing the federal income tax system. The court found that the petitioner had made a sufficient showing of a potential First Amendment violation to warrant an evidentiary hearing. *Id.* at 118. The case was remanded to the district court to determine whether enforcement of the subpoena would chill associational rights. *Id.* If so, the government was directed to demonstrate a compelling need for documents identifying petitioner's members. The district court was then directed to determine whether the government could acquire the needed information by less intrusive means, including obtaining the records with the member's name deleted or by otherwise limiting the breadth of the subpoena. *Id.*; *see also First Nat'l Bank of Tulsa*, 865 F2d at 221; *National Commodity and Barter Ass'n v. United States*, 951 F2d 1172 (10th Cir. 1991); *In re Grand Jury Proceeding*, 842 F2d 1229, 1232-33 (11th Cir. 1988).

In situations such as this one, where the vitality of the *Garrity* doctrine is at stake, the district court should have adopted a similar approach. As a threshold matter, it should have required the government to certify that the Officers, whose Internal Affairs statements had been subpoenaed, were not targets of the grand jury investigation. If the Officers were targets, the Internal Affairs statements should not have been disclosed and the subpoena

should have been quashed. If the Officers were not targets of the current grand jury investigation, the district court should have held an evidentiary hearing and required the government to demonstrate that (1) it has a compelling need for the material, (2) there is a substantial relationship to the grand jury's investigative mission, (3) the relevant information cannot be obtained by a less intrusive means. *In re First Nat'l Bank*, 701 F2d at 117. These simple procedural safeguards would have prevented overzealous prosecutors from abusing the grand jury subpoena process in their pursuit of police misconduct while protecting the integrity of the IAU investigation process and the *Garrity* rights of the Officers.

1. Where police officers are targets of a grand jury investigation, the disclosure of their officially coerced Internal Affairs statements to the grand jury causes an impermissible violation of the Fifth Amendment to transpire in the grand jury's presence.

If a police officer is the target of a grand jury investigation, disclosure of his officially coerced Internal Affairs statement causes an impermissible violation of the Fifth Amendment to occur in the grand jury's presence. *United States v. Calandra*, 414 U.S. 338, 346 (1974); *Weaver v. Brenner*, 40 F3d 527, 535 (2nd Cir. 1994); *United States v. North*, 920 F2d 940, 947 (D.C. Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2235 (1991).

By its own terms, the Fifth Amendment declares that no person can be compelled to incriminate himself in a criminal proceeding. As the Court made clear in *Lefkowitz*:

> The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Lefkowitz, 414 U.S. at 77. Affirming this principle in *Calandra*, the Court stated that a violation of the Fifth Amendment which transpires before a grand jury will invalidate an indictment. *Calandra*, 414 U.S. at 366.

Garrity and its progeny created a new category of Fifth Amendment violation. In contrast to the classic violation where police officers use physical or mental coercion to obtain a statement from a suspect, the *Garrity* cases carved out a new category wherein the coercion is sanctioned by the government.[3] This distinction, between statements coerced in violation of the law and statements coerced with the law's blessing, is critical to understanding why the holding in *Garrity* requires district court supervision at the grand jury stage where statements

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[3] The court below erroneously held that the Officers' Internal Affairs statements were not coerced because they were given *Garrity* warnings prior to making their statements. (App. 14-15). This holding demonstrates a fundamental misunderstanding of the nature of official coercion and its corollary grant of immunity. *Garrity* and its progeny stand for the principle that the government has the power to coerce statements from police officers at the cost of depriving them of their profession. It is these officially coerced statements that *Garrity* prevents from being used against police officers in a subsequent criminal proceeding.

given by target officers after *Garrity* warnings are subpoenaed for use by the grand jury in a criminal investigation.

In the first instance, the Fifth Amendment violation occurs at the time of the government coercion. In the second, the violation occurs only when the resulting statements are put to use against the declarant in a criminal proceeding. In this case, the violation of the Fifth Amendment did not occur when the officers' Internal Affairs statements were coerced: the violation occurred where the Internal Affairs statements of a target officer were produced to the grand jury. *See e.g. Weaver*, 40 F3d at 535 (holding that use of a declarant's coerced confession before a grand jury would violate declarant's Fifth Amendment rights and serve as a predicate for a civil rights action against the government); *North*, 920 F2d at 947.

North discusses the type of constitutional violation at issue here. In *North*, a former assistant to then President Reagan's National Security Advisor, was compelled to give testimony before Congressional hearings under a grant of immunity. *Id.* at 940. After his conviction on charges related to the congressional investigation, North challenged his indictment on the grounds that the grand jury proceedings had been tainted by the use or derivative use of his testimony before Congress. *Id.* On appeal, the D.C. Circuit vacated in part and reversed in part Oliver North's conviction and granted the Independent Counsel's petition for rehearing. Finding that use or derivative use of North's immunized testimony in the grand jury proceedings would have violated North's Fifth Amendment rights, the Court held that North was

entitled to a full *Kastigar* hearing. *Id.* at 941-949; *Kastigar v. United States*, 406 U.S. 441 (1972).

In *North*, the D.C. Circuit took great pains to reconcile its prior decision in *United States v. Rinaldi*, 808 F2d 579, 582-83 (D.C. Cir. 1987), with a long line of Supreme Court cases cited by the Independent Counsel. In *Rinaldi*, the court had held that a grand jury may not consider immunized testimony or evidence derived therefrom. *Id.* at 1582-83. By contrast, the Independent Counsel cited cases holding that "a defendant who has been compelled to incriminate himself is entitled only to have that evidence suppressed at trial and not to have it excluded from consideration by the grand jury." *North*, 920 F2d at 947.

Rejecting the Independent Counsel's arguments, the *North* court stated:

> [a]ll of the cases the IC cites . . . involve the presentation to the grand jury of evidence *previously* obtained in violation of a defendant's privilege against self-incrimination; none involves grand jury consideration of testimony obtained from the defendant through a grant of immunity. The IC thus continues to miss the fundamental distinction between the presentation to the grand jury of evidence that has previously been unconstitutionally obtained and that of constitutionally-obtained evidence whose exposure to the grand jury amounts to a constitutional violation in and of itself.

North, 920 F2d at 947.

Relying upon this Court's decision in *Calandra*, the D.C. Circuit made clear that it would not permit the

grand jury to become the instrument which *caused* a constitutional violation. *Id.* Underlying this distinction is a concern for the integrity of the criminal justice process at the grand jury stage. When the government has already violated a person's rights, exclusion constitutes a mere remedy for a past wrong. *North*, 920 F2d at 948. When, however, the grand jury itself violates a privilege, "such action presents a question not of remedies, but of *rights*." *Id.* at 862, *citing Calandra*, 414 U.S. 338 (emphasis added). By presenting immunized testimony to a grand jury, the government destroys the integrity of the entire grand jury process by reneging on its "constitutionally-mandated bargain and . . . the constitutional violation is part and parcel of the grand jury process. The presentation – 'use' – of the testimony is precisely the proscribed act." *Id.*; *see also Weaver*, 40 F3d at 535.

This is precisely what happened to the Officers here. After compelling statements from the Officers about the shooting of Peter Klunck, the government used the Officers' compelled statements in a criminal proceeding without providing the Officers any assurance that they were not targets of the grand jury's criminal investigation. The Officers' constitutional right to "immunity" was utterly disregarded without any judicial determination of whether or not use of the statements before the grand jury would violate the privilege against self-incrimination.

The court below erroneously concluded that because none of the Officers had yet been identified as targets, disclosure of their Internal Affairs statements to the grand jury did not constitute "use" of their statements against them in a criminal proceeding. (App. 15-16). To

the extent any of the Officers is a target of the criminal investigation, the government's disclosure of his Internal Affairs statements caused an impermissible violation of the Fifth Amendment to transpire in the grand jury's presence. Such practices erode the integrity of the entire grand jury process and cannot be tolerated. This is especially true where the impermissible violation can be avoided entirely by the simple expedient of requiring prosecutors to certify that the police officer, whose Internal Affairs statement has been subpoenaed, is not a target of the grand jury investigation.

2. The Officers should not be forced to rely upon the government's unilateral assurances that they are not targets of the grand jury investigation.

The Tenth Circuit ignored the host of constitutional problems created by the grand jury prosecutor's unsupervised subpoena power in this case by adopting the government's position that prosecutors already employ ample safeguards to prevent the abuse of the Officers' Fifth Amendment rights. (App. 17, quoting Appellee's 10th Circuit Brief at 20). It refused to require judicial supervision at the grand jury stage, finding that the government's procedures for safeguarding the Officers' Fifth Amendment rights were adequate. (App. 20-21). Misunderstanding the nature of the Officers' dilemma and the *Garrity* doctrine, it then concluded that if and when the Officers were indicted, a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), would provide a satisfactory remedy.

Such a position runs counter to this Court's admonition that the federal courts have an independent responsibility to guard against potential constitutional abuses by law enforcement. *McNabb*, 318 U.S. at 347. By refusing to institute procedural safeguards, the Tenth Circuit consigned the Officers to reliance upon the integrity and good faith of the government. Clearly, where the government suspects police officers of criminal misconduct, its unilateral promises to play by the rules do not afford police officers protection commensurate with the assertion of their Fifth Amendment rights. *Lefkowitz v. Turley*, 414 U.S. at 85; *Kastigar v. United States*, 406 U.S. 441 (1972).

This Court developed the *Garrity* doctrine not just to protect police officers' Fifth Amendment rights at the time of trial but to accommodate the tension between those rights and the integrity of the IAU investigation process. While a *Kastigar* hearing may protect an individual officer's Fifth Amendment rights in the event of criminal prosecution, it does nothing to mitigate the chilling effect this disclosure has on the IAU investigation process and the officer's good faith participation in that process.

As the court below noted, the protection afforded to the Officers by *Garrity* and its progeny are similar to the protection afforded statutorily immunized witnesses by this Court in *Kastigar*. (App. 18). In *Kastigar*, the Court endorsed the fact that the immunity statute does not make the immunized witness "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Id.* at 460. Not only is the prosecution prohibited from using the testimony "in *any* respect", it also has the affirmative obligation of showing

that "the evidence it proposes to use [at trial] is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460 (emphasis in the original), *quoting Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964) n.18. It logically follows that the same protections applying to a person's statutorily immunized testimony must apply to the police officers' officially coerced, Internal Affairs statements.

The protections the Officers have requested in this case are, to the grand jury, as the *Kastigar* protections are to trial. Under *Kastigar* it is clear that the Officers' Internal Affairs statements cannot be used against them "in *any* respect". *Kastigar*, 406 U.S. at 453. By prohibiting their use "in *any* respect", the *Kastigar* Court intended to "insure[ ] that the testimony cannot lead to the infliction of criminal penalties on the witness."

Rather than being lulled into accepting the government's unilateral assurances that it will prevent the unconstitutional use of the statements, the Court should require the government to certify before a disinterested judicial body that the officer, whose Internal Affairs statement it seeks to introduce to a grand jury, is not a target of that criminal proceeding. *Id.*

3. Where police officers are not targets of the current grand jury investigation, an evidentiary hearing is necessary to preserve the "rational accommodation" of policy interests and constitutional rights recognized by *Garrity*.

Even where the government certifies that the police officer is not a target of the current grand jury investigation, the inquiry should not stop. The blanket disclosure of a non-target police officer's Internal Affairs statement may provide the prosecutor with information that results in a subsequent grand jury investigation where the non-target officer suddenly becomes a target. In anticipation of such an occurrence and with the hope of preventing on-going abuses of the grand jury process, district courts should be required to hold an evidentiary hearing where the government must demonstrate that (1) it has a compelling need for the material, (2) there is a substantial relationship to the grand jury's investigative mission, (3) the relevant information cannot be obtained by a less intrusive means. *In re First Nat'l Bank*, 701 F2d at 117.[4]

An evidentiary hearing in this case would have protected the integrity of the IAU investigation process while providing practical assurances to the Officers that their coerced Internal Affairs statement could not be obtained

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[4] In light of the Tenth Circuit's previous decisions requiring judicial supervision where the grand jury process infringes First Amendment rights, its refusal to require similar safeguards for the protection of police officers' Fifth Amendment rights is incomprehensible. In this case, the Officers request only that the district court apply the same procedural safeguards in the *Garrity* context that already exist in the First Amendment context.

and used against them by an overzealous prosecutor. Instead, in utter disregard of the *Garrity* doctrine the government made no effort to demonstrate that the Officers' coerced Internal Affairs statements were critical to the grand jury investigation. In fact, the Officers' Internal Affairs statements were not critical. The government had available to it the APD homicide investigation, together with all the witness statements obtained by APD police investigators and FBI agents.

Consistent with the Officers' Fifth Amendment rights, the government could have subpoenaed any or all of the Officers and compel their live testimony before the grand jury through grants of statutory use immunity. 18 U.S.C. §6002 (1985). This less intrusive means of obtaining the Officers' statements was always available to the government. Accepting the government's proposal to sanitize the IAU file after disclosure to remove the compelled statements of target witnesses prior to release to the grand jury, the District Court did not even require the government to affirmatively state that the Officers were not targets of the grand jury investigation. Thus, the Officers had no idea whether they would be indicted as a consequence of their compelled testimony. In essence, neither the government nor the District Court made any accommodation to protect the integrity of the IAU investigation process or the Officers' rights to limit the disclosure of their officially coerced statements.

CONCLUSION

The decision below conflicts with the purpose and intent of the jurisprudence developed by this Court in *Garrity* and its progeny. Certiorari should be granted because the time has come for the Court to revisit *Garrity* in order to define the scope of its protections and develop procedural safeguards for the preservation of its "rational accommodation" of policy interests and constitutional rights. The continued vitality of the *Garrity* doctrine is at stake.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

IN RE GRAND JURY SUBPOENAS DATED DECEMBER 7 AND 8, ISSUED TO BOB STOVER, CHIEF OF ALBUQUERQUE POLICE DEPARTMENT, Petitioner v. UNITED STATES OF AMERICA, Respondent - Appellee	Case Nos. 94-2032 94-2033 (Filed Nov. 21, 1994)
STEVE NAKAMURA, Albuquerque Police Department Officer; JOHN DOES 1 THROUGH 5, Five Albuquerque Police Department Officers, Intervenors - Real Parties in Interest - Appellants	

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(Misc. No. 93-2)

Peter Schoenburg (Randi McGinn with him on the briefs), Rothstein, Donatelli, Hughes, Dahlstrom, Cron & Schoenburg, Albuquerque, New Mexico, for Appellants.

Mark L. Gross, Department of Justice, Washington, D.C. (Jessica Dunsay Silver, Department of Justice, Washington, D.C.; John J. Kelly, United States Attorney, Albuquerque, New Mexico; and Deval L. Patrick, Assistant Attorney General, Washington, D.C., with him on the briefs), for Appellee.

Before **ANDERSON, REAVLEY,*** and **HENRY,** Circuit Judges.

ANDERSON, Circuit Judge.

In these consolidated appeals, we consider whether presentation to a grand jury of a police officer's compelled statement taken pursuant to an internal affairs investigation constitutes a violation of the officer's Fifth Amendment right against self-incrimination. We hold that it does not.

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* The Honorable Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

BACKGROUND

These appeals arise out of the fatal shooting of Peter Klunck by Albuquerque Police Department ("APD") officers on January 27, 1989. Following the shooting, the APD Internal Affairs Unit ("IAU") initiated an investigation into the incident. Department policy provides that APD officers must answer questions put to them during the course of an internal affairs investigation, but departmental regulations also provide that any statement given by an officer cannot be used against that officer in a subsequent criminal prosecution:

> Personnel must, as a condition of continuing employment, truthfully answer any and all questions relating to the matter under investigation regardless of whether they are a participant or a witness to the matter. The determination of whether a question is relevant to the matter under investigation shall be made solely by the investigator conducting the investigation. Nothing contained herein shall be the basis for an individual waiving his Fifth Amendment rights under the Constitution or law of the United States of America or the State of New Mexico.

Albuquerque Police Department, Administrative Order § 3-43-10(B), Appellants' App. at 19. During the course of the investigation, Officer Steve Nakamura and other APD officers who were at the scene of the Klunck shooting were interviewed by IAU investigators. After receiving the admonition and assurances recited above, the officers answered the questions put to them by the investigator.

In May of 1992, the Federal Bureau of Investigation began a preliminary investigation into the shooting of Mr.

Klunck. The FBI requested the internal affairs file from APD Chief Bob Stover who refused the request on the basis that the statements were compelled by department policy and therefore not subject to disclosure. Appellants' App. at 18.

On December 7, 1993, a federal grand jury in Albuquerque investigating the shooting of Mr. Klunck served a subpoena duces tecum on Chief Stover requesting a "[c]omplete copy of the Internal Affairs Report regarding the shooting and subsequent death of Peter James Klunck by officers of the Albuquerque Police Department." Appellants' App. at 12. On December 8, a grand jury in Las Cruces subpoenaed the same documents.

Stover filed a motion to quash or modify the subpoena on the ground that the officers were compelled to give their statements under threat of termination and, therefore, under *Garrity v. New Jersey*, 385 U.S. 493 (1967), these statements could not be used in a subsequent criminal proceeding against the officers. Appellants' App. at 59-63. The district court reviewed the statements *in camera* and found that Stover had failed to carry his burden of showing that the subpoena was unreasonable. *See* Fed. R. Crim. P. 17(c). On January 7, 1994, the court denied Stover's motion to quash. The court ordered Stover to turn the subpoenaed material over to the Assistant United States Attorney with directions that the documents not be disclosed except to those persons authorized to receive grand jury material under Fed. R. Crim. P. 6. Stover immediately filed a motion to stay the order.

On January 11, 1994, Officer Nakamura filed a motion to intervene as a real party in interest and

requested a stay and reconsideration of the court's order denying Stover's motion to quash the subpoena. Nakamura, like Stover, argued that the internal affairs statements were compelled and, therefore, *Garrity* required the court to limit and supervise the grand jury's use of the internal affairs file. Appellants' App. at 114-19. Additionally, five unnamed members of the APD, all of whom had been involved with the Klunck shooting and had given internal affairs statements, separately filed a "Motion for Intervention, Stay of Order and Reconsideration." The officers also argued that, under *Garrity*, their statements could not be disclosed to the grand jury.

The district court denied Stover's motion for a stay and on January 12, 1994, denied the motions of Nakamura and the five unnamed officers. The statements were turned over to the grand jury. Subsequently, Officer Nakamura was subpoenaed and testified before the grand jury in Albuquerque under a formal grant of immunity. *See* 18 U.S.C. § 6002. The record does not disclose that any of the APD officers were indicted by the grand jury. However, the jury had not been discharged at the time the district court entered its order.

Officer Nakamura and the five unnamed officers challenge the district court's denial of their motions to intervene,[1] claiming that the very act of disclosing a

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[1] The district court denied the officers' motions "to intervene, stay, and reconsider disclosure order of January 7, 1994." Appellants' App. at 126, 128. Persons situated as the officers are in this case; that is, those claiming that they will be injured by the disclosure of allegedly privileged material, generally have the right to intervene in a pending criminal matter. *See United*

police officer's compelled statement to the grand jury constitutes a violation of the officer's Fifth Amendment right against self incrimination. In the alternative, they argue that the court erred in ordering production of the internal affairs statements without conducting a hearing to determine (1) the government's "compelling interest" in the statements, (2) that the statements sought bore a substantial relationship to the investigation, and (3) that the officers whose statements were sought were not targets of the investigation.

DISCUSSION

I.

Before reaching the merits of this appeal, we first address the basis of this court's jurisdiction. Our appellate jurisdiction under 28 U.S.C. § 1291 is limited to final decisions rendered by the district courts. The denial of a motion to quash a subpoena duces tecum is not a final decision, but is, rather, interlocutory in nature and thus not an appealable order. *United States v. Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick v. United States*, 309 U.S. 323, 329-30 (1940); *In re Grand Jury Proceedings*, 857 F.2d 710, 711 (10th Cir. 1988) (*"Company X"*).

States v. Feeney, 641 F.2d 821, 824 (10th Cir. 1981). Accordingly, our review considers the substantive bases of the court's denial of the officers' motions. Moreover, because the officers' motions were based upon the same substantive arguments as those propounded by Chief Stover in his motion to quash, we necessarily must review the substantive basis for the district court's denial of that motion as well.

The law is well settled that "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *Ryan*, 402 U.S. at 532. The Supreme Court, however, has recognized an exception to this general rule. In *Perlman v. United States*, 247 U.S. 7 (1918), the Court held that the district court's order denying Perlman's motion to quash a subpoena was immediately appealable because the third party to whom the subpoena was directed, a court clerk, would not have risked a contempt citation in order to preserve Perlman's privilege. *Id.* at 13.

We addressed the parameters of the *Perlman* exception in *In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461 (10th Cir. 1983), holding that in order for a corporate client to appeal denial of its motion to quash a subpoena directed at its attorney, it had to "await a contempt citation against its attorney or be able to prove that the attorney [would] produce the records rather than risk contempt." *Id.* at 1466; *see United States v. Nixon*, 418 U.S. 683, 691 (1974); *Company X*, 887 F.2d at 711-12.

In this case, however, Chief Stover, informed the officers that he intended to turn the internal affairs file over to the grand jury. Appellants' App. at 122. Thus, if denial of the officers' motions were not immediately appealable, they would have been "powerless to avert the mischief of the order." *Perlman*, 247 U.S. at 13; *see In re Federal Grand Jury Proceedings, Cohen*, 975 F.2d 1488, 1491-92 (11th Cir. 1992) (holding intervening police officers' claim within *Perlman* exception because attorney in

that case not expected to risk contempt). We conclude, therefore, that, as to Nakamura and the five unnamed APD officers, the district court's denial of their motions to intervene, stay, and reconsider constituted a final appealable order. Accordingly, we have jurisdiction pursuant to 28 U.S.C. § 1291.

Our next threshold inquiry is whether this case is moot. "[A] federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " *Church of Scientology v. United States*, 113 S. Ct. 447, 449 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); *see North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *In re Osborn*, 24 F.3d 1199, 1203 (10th Cir. 1994). "[T]he existence of a live case or controversy is a constitutional prerequisite to the jurisdiction of the federal courts." *Beattie v. United States*, 949 F.2d 1092, 1093 (10th Cir. 1991). Thus, if an event occurs during the pendency of an appeal which makes it impossible for the court to render the prevailing party "any effectual relief whatever," the appeal must be dismissed as moot. *Mills*, 159 U.S. at 653 (quoted in *Church of Scientology*, 113 S. Ct. at 449).

The government contends that this case is moot because the internal affairs statements now have been turned over to the grand jury. In *Church of Scientology*, however, the Supreme Court rejected a similar argument, holding that the mere compliance with a summons – in that case, the turning over of audio tapes to the Internal Revenue Service – does not moot an appeal. The Court noted that although it was too late to provide full relief to the Church, a court could effectuate a partial remedy by

ordering the IRS to return or destroy the tapes. *Church of Scientology*, 113 S. Ct. at 450. The government argues, however, that *Church of Scientology* is distinguishable from the present case because *Church of Scientology* involved a Fourth Amendment claim whereas this case involves a Fifth Amendment claim. According to the government, the Fourth Amendment privacy interest can be restored by the return of "papers and effects," whereas incriminating statements, once exposed to a grand jury, cannot be reclaimed. We find the distinction irrelevant in this case.

A federal court has the power to order improperly obtained materials – be they audio tapes possessed by the IRS or internal affairs files in the possession of a grand jury – returned or destroyed. Contrary to the government's argument, such an order would effectuate at least some modicum of relief,[2] and therefore, the case before us is not moot.

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[2] Obviously, the court could augment its order that the internal affairs files be returned or destroyed. For example, the court might order that the grand jury refrain from any use of the statements contained in the files. Moreover, if the taint were serious, the court could discharge the grand jury and impanel a new one. Fed. R.Crim. P. 6(c). We do not suggest, at this point, that any such remedies necessarily would be ordered, *see Church of Scientology*, 113 S. Ct. at 450 n.6; *Sierra Club v. Yeutter*, 911 F.2d 1405, 1420 (10th Cir. 1990) (refusing to "invoke judicial relief based largely on speculation and hypotheticals. . . . The federal courts do not render advisory opinions."), but simply note that such additional, or other recourse may be available.

II.

We turn now to the merits of the case. While a motion to quash generally is not an appealable order, we review the district court's order denying the officers' motions in this case for an abuse of discretion. *See Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir. 1988); *see also In re Grand Jury Proceedings*, 13 F.3d 1293, 1295 (9th Cir. 1994). Whether denial of the officers' motions has caused a violation of the Fifth Amendment is a conclusion that we review de novo. *United States v. Thody*, 978 F.2d 625, 628 (10th Cir. 1992), *cert. denied*. 115 S. Ct. 273 (1994).

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[3] The Supreme Court has stated that "[t]he essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.' " *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-82 (1961)); *see Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

In this case, the police officers argue that the very act of disclosing a compelled statement to the grand jury constitutes a per se violation of the declarant's Fifth Amendment privilege against self-incrimination. Thus, they contend, the district court committed constitutional

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[3] The privilege against self.incrimination applies to the states by the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

error in ordering the internal affairs statements turned over to the grand jury. The government, on the other hand, argues that it is the grand jury's use of a compelled statement, not the mere disclosure of the statement, that offends the Constitution. The government's position is that if, and when, any officer is indicted, the officer will have the opportunity to challenge the indictment and the government will have the burden of proving that the indictment was obtained without the use of the officer's compelled statement or any evidence derived from that statement.[4]

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[4] In support of this argument, the government relies on *Kastigar v. United States*, 406 U.S. 441 (1972), where the Court held that the use and derivative-use immunity provided the appellant under 18 U.S.C. § 6002 was coextensive with the protections of the Fifth Amendment. *Id.* at 461-62. The Court went on to note that a person granted immunity under the statute and subsequently prosecuted, "need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Id.* Thus, it has become common for the district court to hold a "*Kastigar* hearing" wherein the government must carry this burden of proving that its evidence against the defendant derives entirely from sources other than the defendant's immunized statements, or that the use of any evidence tainted by the statements was harmless beyond a reasonable doubt. *See United States v. Koon*, Nos. 93-50561, 93-50562, 93-50608, 93-50609, 1994 WL 445725, at *7-*8 (9th Cir. Aug. 19, 1994); *United States v. Schmidgall*, 25 F.3d 1523, 1528-29 (11th Cir. 1994); *United States v. Bartel*, 19 F.3d 1105, 1111-12 (6th Cir.), *cert. denied*, 115 S. Ct. 113 (1994); *United States v. North*, 920 F.2d 940, 942 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *United States v. Garrett*, 797 F.2d 656, 664 (8th Cir. 1986); *United States v. Beery*, 678 F.2d 856, 860-62 (10th Cir. 1982). "[A] trial court may hold a *Kastigar* hearing pre-trial, post-trial, mid-trial (as evidence is offered), or

Both the government and the police officers rely on a line of Supreme Court cases, beginning with *Garrity v. New Jersey*, 385 U.S. 493 (1967), that address the application of the Fifth Amendment privilege to public employees and public officers. *See, e.g., Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Spevack v. Klein*, 385 U.S. 511, 516 (1967).

Justice Powell, sitting by designation with the Fourth Circuit, recently articulated the import of the *Garrity* line of cases: " 'If the State presents a person with the "Hobson's choice" of incriminating himself or suffering a penalty, and he nevertheless refuses to respond, the State cannot constitutionally make good on its threat to penalize him.' " *Wiley v. Doory*, 14 F.3d 993, 996 (4th Cir. 1994) (quoting *Minnesota v. Murphy*, 465 U.S. 420, 443 (1984) (Marshall, J., dissenting)); *see Turley*, 414 U.S. at 77; *Sanitation Men*, 392 U.S. at 284; *Gardner*, 392 U.S. at 277-78. " 'Conversely, if the threatened person decides to talk instead of asserting his privilege, the State cannot use his admissions against him in a subsequent criminal prosecution.' " *Wiley*, 14 F.3d at 996 (quoting *Murphy*, 465 U.S. at 443 (Marshall, J., dissenting)); *see Garrity*, 385 U.S. at 500.

In a case such as this, therefore, the Fifth Amendment operates to restrict the government's conduct in two

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it may employ some combination of these methods. A pre-trial hearing is the most common choice." *United States v. North*, 910 F.2d 843, 854 (D.C. Cir.), *modified on reh'g*, 920 F.2d 940, 942 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

ways. First, a statement may not be *obtained* in violation of the Constitution. Thus, the State may not insist that public employees "waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them." *Turley*, 414 U.S. at 84-85. On the other hand, police officers, being public employees, "subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights." *Sanitation Men*, 392 U.S. at 285. Thus, a police officer may be terminated for refusing to answer questions "specifically, directly, and narrowly relating to the performance of his official duties," so long as he is not "required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself." *Gardner*, 392 U.S. at 278; *accord Hester v. Milledgeville*, 777 F.2d 1492, 1495-96 (11th Cir. 1985); *Gulden v. McCorkle*, 680 F.2d 1070, 1074 (5th Cir. 1982) ("[I]t is the compelled answer *in combination with* the compelled waiver of immunity that creates the Hobson's choice for the employee."), *cert. denied*, 459 U.S. 1206 (1983).

The second restriction placed on the government in this context is a complete prohibition on the "*use* in subsequent criminal proceedings of statements obtained under threat of removal from office, and . . . it extends to all, whether they are policemen or other members of our body politic." *Garrity*, 385 U.S. at 500 (emphasis added). Thus, police officers, as public employees "may be compelled to respond to questions about the performance of their duties but only if their answers cannot be used

against them in subsequent criminal prosecutions." *Turley*, 414 U.S. at 79. Moreover, the protections afforded the officers in such a case are substantial: "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Kastigar*, 406 U.S. at 460.

This case, however, is not directly controlled by either of these two lines of analysis. The officers' internal affairs statements were neither obtained nor have they been used in violation of the Constitution. No officer was required to "waive his immunity" with respect to the use of his answers, or evidence derived from those answers, in a subsequent criminal prosecution. *See Gardner*, 392 U.S. at 278; *see also Kastigar*, 406 U.S. at 460-61; *Garrity*, 385 U.S. at 500. In fact, the officers were advised by the internal affairs unit that department policy did not require them to waive their "Fifth Amendment rights under the Constitution or laws of the United States or the State of New Mexico." Appellants' App. at 19.[5] Thus, the

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[5] While this case does not require us to decide whether the government must affirmatively advise a police officer who is undergoing an internal affairs interview that the officer is not being forced to waive his or her Fifth Amendment rights, other circuits arguably have adopted such a requirement. *See Confederation of Police v. Conlisk*, 489 F.2d 891, 894-95 & n.4 (7th Cir. 1973) ("[B]y advising the officers that their statements, when given under threat of discharge, cannot be used against them in subsequent criminal proceedings, the IAD is not 'granting' immunity from prosecution; it is merely advising the officers of the constitutional limitations on any criminal prosecution should they answer."), *cert. denied*, 416 U.S. 956 (1974); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 426

officers' statements, though compelled under threat of termination, were not obtained in violation of the Constitution. *Sanitation Men,* 392 U.S. at 284.

Likewise, the officers' statements have not been used in violation of the Constitution. As previously discussed, if the government does not force a police officer to waive the privilege against self-incrimination, the Constitution does not bar the government from compelling the officer to "answer questions specifically, directly, and narrowly relating to the performance of his official duties." *Gardner,* 392 U.S. at 278.[6] Rather, the Constitution is violated only when the compelled statement, or the fruit of that statement, is used against the officer in a subsequent criminal proceeding. *Garrity,* 385 U.S. at 500. Garrity's protection, therefore, acts to immunize these compelled statements, as it prohibits their subsequent use against the officer so as not to offend the Fifth Amendment privilege.

F.2d 619, 626-27 (2d Cir. 1970) ("[I]f a public officer is asked about performance of his official duties and is not required to waive immunity, the privilege is not a bar to his dismissal for refusal to answer. . . . 'After proper proceedings' means proceedings, such as those held here, in which the employee is asked only pertinent questions about the performance of his duties and is duly advised of his options and the consequences of his choice."), *cert. denied,* 406 U.S. 961 (1972); *see also* Byron L. Warnken, *The Law Enforcement Officer's Privilege Against Self-Incrimination,* 16 U. Balt. L. Rev. 452 (1987).

[6] The officers do not contend that the questioning was broad or overreaching.

While it is true that indictments may be returned in this matter against APD officers whose compelled statements have been considered by the grand jury, that eventuality has not yet been realized. It is axiomatic that the Fifth Amendment protects against "real dangers, not remote and speculative possibilities." *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972). Thus, the present case is analogous to *United States v. Peister*, 631 F.2d 658 (10th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), where the appellant, who proceeded pro se at trial and was convicted of Internal Revenue Code violations, claimed that completion of a financial disclosure form, for the purpose of obtaining appointed counsel, would have violated his privilege against self-incrimination. Noting the absence in the record of any evidence that the required disclosure would in fact have jeopardized his Fifth Amendment privilege, we rejected his claim:

> We hold defendant should not be relieved of this burden when any conflict with the Fifth Amendment right is speculative and prospective only. The time for protection will come when, if ever, the government attempts to use the information against the defendant at trial. We are not willing to assume that the government will make such use, or if it does, that a court will allow it to do so.

Id. at 662; *see United States v. Schmidt*, 816 F.2d 1477, 1481 & n.3 (10th Cir. 1987); *accord Marchetti v. United States*, 390 U.S. 39, 53 (1968) (incrimination resulting from a compelled statement must be "substantial and 'real,' not merely trifling or imaginary, hazards of incrimination").

As in *Peister*, at this point in the proceedings, we simply have no way of knowing whether the statements have been, or will be, used in a constitutionally proscribed manner. If an officer, whose compelled statement has been considered by the grand jury, ultimately is indicted, that officer will be able to challenge the indictment and the government will be required to prove that its evidence derives entirely from legitimate sources or that the grand jury's exposure to the officer's statement was harmless. *Kastigar*, 406 U.S. at 460; *Beery*, 678 F.2d at 863; *see United States v. Pino*, 708 F.2d 523, 531 (10th Cir. 1983).

Moreover, it is significant to note the procedural protections the government has in place. "When immunized statements are received in a case handled by the Criminal Section of the Civil Rights Division, personnel from the Criminal Section sanitize the reports by redacting statements and fruits of statements by the target of the investigation which could violate the standards of use immunity if used against the individual who made the statement." Appellee's Br. at 20; *see United States Attorneys' Manual* § 9-23-400; *see also United States v. Crowson*, 828 F.2d 1427, 1429-32 & n.4 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988). Thus, incriminating statements are, in theory, never seen by either the government attorney handling the case or the grand jury.

Furthermore, we expect that attorneys appearing before the federal courts will demonstrate the highest level of professional responsibility. Government prosecutors are held to an even higher standard.[7] Thus we trust that government

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[7] *See Model Rules of Professional Conduct* Rule 3.8 cmt. 1.

attorneys, guided by ethical and prudential considerations as well as department policy, will strictly safeguard the Fifth Amendment rights of police officers under investigation.[8]

Nevertheless, police officers whose statements are subpoenaed are not required to "rely upon the general assurances of the government that they [are] not targets of the grand jury investigation." Appellants' Br. at 24. An officer who has been compelled to provide an internal affairs statement and who subsequently is indicted, much like a person compelled to testify before a grand jury under a formal grant of immunity, "is not dependant [sic] . . . upon the integrity and good faith of the prosecuting authorities." *Kastigar,* 406 U.S. at 460. We apprehend no qualitative distinction between the protections afforded a police officer who has been compelled to answer direct, specific, and narrowly tailored questions in the context of an internal affairs interview, and a witness whose grand jury testimony is immunized under 18 U.S.C. § 6002.[9] Thus, the *Kastigar*-style hearing to

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[8] A second factor motivating government attorneys to sedulously protect against the improper use of compelled statements is the desire to see that indictments, once obtained, are not dismissed for violations of the defendant's constitutional rights.

[9] In a case such as this, we presume that a police officer's sworn grand jury testimony would be consistent with the statements the officer made in the internal affairs interview. Thus, there is no reasoned basis for immunizing the information obtained from Officer Nakamura, who gave an internal affairs statement and who also testified before the grand jury, while not affording the same immunization to the information obtained from the other officers, who gave statements but who have not testified.

which the officer is entitled in any further proceeding provides an adequate safeguard against violation of his Fifth Amendment rights. *See United States v. Kember*, 648 F.2d 1354, 1361.63 (D.C. Cir. 1980).

In sum, the officers' generalized fear that the grand jury may consider a police officer's compelled internal affairs statement and return an indictment against the officer on that basis is speculative at most. It certainly does not provide a sufficient basis for asserting a blanket claim of Fifth Amendment privilege in keeping the internal affairs statements from the grand jury. *See United States v. Clark*, 847 F.2d 1467, 1474-75 (10th Cir. 1988); *Borgeson v. United States*, 757 F.2d 1071, 1073 (10th Cir. 1985) (per curiam). Moreover, the protections already in place guarantee that the constitutional rights of law enforcement personnel will remain inviolate and that police officers will not be "relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). Accordingly, we hold that the mere disclosure to the grand jury of a police officer's potentially incriminating compelled statement does not constitute a violation of the officer's Fifth Amendment privilege against self-incrimination.

III.

The officers next contend that, even if disclosure of the statements to the grand jury does not constitute a per se violation of the Fifth Amendment, this court nevertheless must exercise its supervisory authority over the

grand jury proceedings in order to safeguard the constitutional rights implicated.[10] The officers argue that the district court, prior to ordering the disclosure of compelled internal affairs statements to the grand jury, must hold a hearing in which the government would be required to demonstrate (1) a "compelling need" for the statements, (2) a substantial relationship between the statements and the grand jury's investigative mission, and (3) that none of the officers whose statements are sought are targets of the grand jury investigation. According to the officers, this process not only would insure the protection of a police officer's Fifth Amendment privilege against self-incrimination, but it also would prevent the inevitable chilling effect of a grand jury's carte blanch access to compelled internal affairs statements.

As discussed above, adequate safeguards are in place to insure that a police officer's privilege against self-incrimination is not violated. Thus, what the officers seek is not remedy, but prophylaxis. We are not asked to exercise our supervisory power in fashioning a remedy necessary to safeguard a constitutional right generally. *See United States v. Calandra*, 414 U.S. 338, 343-44 (1974). Rather, we are asked to fashion an ongoing process, adding an additional layer of protection which would insure that the constitutional violation does not occur in

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[10] The government contends that the officers' failure to raise this argument below should preclude review of the issue on appeal. *See In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 280-81 n.3 (10th Cir. 1983). We agree with the government on this point, but as discussed below, dismiss the officers' claim on alternate grounds.

the first instance. *See Michigan v. Tucker*, 417 U.S. 433, 444 (1974); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

We decline to do so. The fashioning of a process pursuant to our "supervisory powers would necessarily presuppose the insufficiency of the remedy set forth in Part II of this opinion. *See Kastigar*, 406 U.S. at 459-60. The remedy, however, is adequate and the Constitution demands nothing more.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

In re GRAND JURY SUBPOENAS
Dated December 7 and 8, 1993,
Issued to Bob Stover, Chief of
Albuquerque Police Department,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Misc. No. 93-2

(Filed Jan. 12, 1994)

ORDER

THIS MATTER having come on for consideration of Petitioner's ***Amended Motion to Quash or Modify Subpoena Duces Tecum,*** filed December 27, 1993, and the Court having reviewed the memoranda of the parties and after an *in camera* inspection of the materials which are the subject of this action, finds the motion is not well taken and should be denied.

Petitioner asks the Court to quash the subpoena for materials which Petitioner contends are excluded from the grand jury on the basis of attorney-client privilege and ***Garrity v. New Jersey,*** 385 U.S. 493 (1967), and its progeny.

The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. ***Branzburg v. Hayes,*** 408 U.S. 665, 668 (1972). Society's

interest is best served by a thorough and extensive investigation. ***Wood v. Georgia,*** 370 U.S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." ***United States v. Stone,*** 429 F.2d 138 (2d Cir. 1970). Subpoenas are the fundamental documents used during a grand jury's investigation because through subpoenas a grand jury can require witnesses to testify and produce documentary evidence for their consideration. It is without cavil that a federal grand jury is to be afforded wide latitude in performing its duties under its broad mandate. In the investigation of possible criminal activity, few limitations are placed on its subpoena powers. ***United States v. R. Enterprises, Inc.,*** ___ U.S. ___, 111 S. Ct. 722 (1991). The only restrictions upon the grand jury concern reasonableness and privilege. The grand jury investigative powers are subject to the limitations imposed by Rule 17(c) which provides that "the court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The burden is on the recipient of the subpoena to show unreasonableness or oppression." ***United States v. R. Enterprises, Inc.,*** 498 U.S. at 292.

The attorney-client privilege is asserted concerning correspondence between former Supreme Court Justice William R. Riordan and the Albuquerque Police Department. From the parties' submissions, it appears that Justice Riordan, who was appointed special counsel, rendered what is characterized as an extremely critical report about the quality of the investigation of the shooting of Peter Klunck by members of the Albuquerque

Police Department. Respondent contends, and Petitioner does not deny, that Justice Riordan also was denied access to some of the reports Petitioner seeks to quash. Under these circumstances, the Court does not believe these communications between Justice Riordan and the Albuquerque Police Department are privileged. Since this correspondence was not included in the material provided for *in camera* inspection, the Court must base its decision on its understanding of the assigned role of Justice Riordan in this matter. It is unclear, however, whether disclosure of this correspondence is still sought. From Petitoner's memorandum, some agreement appears to have been reached by the parties.

As for the privileges claimed under ***Garrity***, the Court disagrees with Petitioner in the reading of ***Garrity***. The question in ***Garrity*** was whether a state, contrary to the Fourth Amendment, could use the threat of discharge to secure incriminatory evidence. The Court pronounced that obtaining incriminating evidence under fear of discharge for refusal to answer incriminating questions was "a choice between the rock and the whirlpool"; that such statements were products of coercion and violated the Fourteenth Amendment. ***Garrity*** does not stand for the proposition, as Petitioner contends, that compelled statements are beyond the purview of a grand jury investigation. Moreover, Petitioner has cited no authority in support of his contention. There are sufficient protections under ***Garrity*** and its progeny, however, to preclude the use of compelled statements against the declarant. Respondent seemingly agrees since it recognizes that the declarants are immunized insofar as the use of the compelled statements.

Respondent also expresses concern that the Government will make improper use of grand jury material; that production is sought merely to satisfy the curiosity of those seeking the material. It is further alleged that materials sought will be used in future civil litigation. Petitioner makes these conclusory allegations without any factual basis. At this stage of the proceedings, the Court will not speculate nor will it ascribe illegal motives to those seeking the material. As for the other concerns, Petitioner should be aware that disclosure of matters before the grand jury are tightly controlled by the Court pursuant to Rule 6 of the Federal Rules of Criminal Procedure and that access to materials is limited to the attorneys in the performance of their duties to enforce federal criminal law. Should later events reveal improper disclosure of grand jury matters, the Court is sufficiently empowered to punish those violating the confidentiality of grand jury proceedings and to protect the constitutional rights of those wronged.

Finally, Petitioner notes in his amended motion that the subpoena does not appear to comply with the purpose implicit in Federal Rules of Criminal Procedure 17(a) and (c) in that it requires production of the requested material to an FBI agent therby [sic] allowing pre-grand jury disclosure. Clearly, under Rule 6(3), disclosure may only be made to the attorney for the Government for use in the performance of his duties and such Government personnel as are deemed necessary by the attorney for assistance in the performance of the attorney's duty to enforce federal criminal law. In order to ensure that there is no violation of the explicit requirements of Rule 6, the Court will require that the requested

material be delivered to the Assistant United States Attorney who in turn may only disclose the material to those persons authorized under Rule 6. Judicial oversight is unwarranted.

Since Petitioner has not satisfied his burden to show that the subpoena duces tecum issued herein is unreasonable or that the material sought is privileged, the Court will deny Petitioner's motion to quash or modify the subpoena duces tecum.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Petitioner's ***Amended Motion to Quash or Modify Subpoena Duces Tecum*** be, and it hereby is, DENIED.

DATED at Albuquerque this 7th day of January, 1994.

/s/ Juan G. Burciaga
JUAN G. BURCIAGA
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

In re GRAND JURY SUBPOENAS
Dated December 7 and 8, 1993,
Issued to Bob Stover, Chief of
Albuquerque Police Department

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Misc. No. 93-2

(Filed Jan. 12, 1994)

ORDER

THIS MATTER is before the Court on a January 11, 1994, motion to intervene as real party in interest, stay and reconsider disclosure Order of January 7, 1994, filed by Albuquerque Police Department Officers John Doe 1 through 5. The Court, having reviewed the record and the relevant law and otherwise being fully advised in the premises finds that the motion is not well taken.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that John Doe 1 through 5's motion to intervene, stay and reconsider disclosure order of January 7, 1994, be, and hereby is, denied.

DATED this 12 day of January, 1994.

/s/ John E. Conway for
Chief Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

In re GRAND JURY SUBPOENAS
Dated December 7 and 8, 1993,
Issued to Bob Stover, Chief of
Albuquerque Police Department

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Misc. No. 93-2

(Filed Jan. 12, 1994)

ORDER

THIS MATTER is before the Court on a January 11, 1994, motion to intervene as real party in interest, stay and reconsider disclosure Order of January 7, 1994, filed by Albuquerque Police Department Officer Steve Nakamura. The Court, having reviewed the record and the relevant law and otherwise being fully advised in the premises finds that the motion is not well taken.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the Intervenor – Real Party in Interest's motion to intervene, stay and reconsider disclosure order of January 7, 1994, be, and hereby is, denied.

DATED this 12 day of January, 1994.

/s/ John E. Conway for
Chief Judge

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FILED
APR 24 1995
OFFICE OF THE CLERK

(2)

No. 94-1401

In the Supreme Court of the United States

OCTOBER TERM, 1994

STEVE NAKAMURA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the court of appeals erred in declining to invoke its supervisory power to require a hearing prior to the disclosure of certain subpoenaed material to a grand jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1401

STEVE NAKAMURA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 40 F.3d 1096. The opinion of the district court (Pet. App. 22-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1994. The petition for a writ of certiorari was filed on February 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This matter arose out of a federal grand jury investigation into the fatal shooting of Peter Klunck by Albuquerque police officers on January 27, 1989.

Following the shooting, the Internal Affairs Unit (IAU) of the Albuquerque Police Department (the Department) conducted an investigation in which it interviewed officers present during the attempt to apprehend Mr. Klunck, including petitioners. Department regulations require officers, as a condition of continuing employment, to answer truthfully all questions relating to matters under IAU investigation. Pet. App. 2-3. The regulations further provide that an officer's answers to such questions "shall [not] be the basis for an individual waiving his Fifth Amendment rights under the Constitution or law of the United States of America or the State of New Mexico." *Ibid.*

2. In 1992, the Federal Bureau of Investigation began an investigation into the shooting of Mr. Klunck to determine whether the shooting violated Mr. Klunck's federal civil rights. As part of its investigation, the FBI requested the Department's IAU investigation file from Department Chief Bob Stover. Chief Stover refused to provide the file, asserting that the officers' compelled statements were not subject to disclosure. C.A. App. 15; Pet. App. 4.

3. On December 7, 1993, a federal grand jury in Albuquerque investigating the shooting of Mr. Klunck served on Chief Stover a subpoena duces tecum requesting a copy of the IAU report. Pet. App. 4. On December 27, 1993, Chief Stover filed a motion to quash or modify the subpoena, arguing that, because the officers' statements were compelled under threat of termination, this Court's decision in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), precluded their use in a subsequent criminal proceeding. Gov't C.A. Br. 3; Pet. App. 4.

4. On January 7, 1994, after viewing the IAU report *in camera*, the district court denied Chief Stover's

motion to quash the subpoena and ordered that the subpoenaed material be turned over to the Assistant United States Attorney with directions that the documents not be disclosed except to those persons authorized to receive grand jury material under Federal Rule of Criminal Procedure 6.[1] Pet. App. 4. Chief Stover filed a motion to stay the order. *Ibid.*

5. On January 11, 1994, petitioner Steve Nakamura, one of the police officers who gave statements to the IAU investigators, moved to intervene and for a stay and reconsideration of the court's January 7, 1994, order. The same day, five unnamed members of the Department who had given IAU statements, also petitioners here, separately filed a "Motion for Intervention, Stay of Order and Reconsideration." Pet. App. 3-5.

6. The district court denied Chief Stover's motion for a stay and, on January 12, 1994, denied petitioners' consolidated motions. Pet. App. 22-26. The district court rejected the contention that *Garrity* precluded disclosure of the IAU report to the grand jury. The court found that the officers "are immunized insofar as the use of the compelled statements," and that "[t]here are sufficient protections under *Garrity* and its progeny * * * to preclude the use of compelled statements against the declarant." *Id.* at 24. The court dismissed as unsupported petitioners' contention that the material might be used in future civil litigation, and noted that,

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[1] Federal Rule of Criminal Procedure 6(e)(3)(A) allows disclosure of matters occurring before the grand jury to government attorneys for use in the performance of their duties, and "such government personnel * * * as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law."

pursuant to Federal Rule of Criminal Procedure 6, "the Court is sufficiently empowered to punish those violating the confidentiality of grand jury proceedings and to protect the constitutional rights of those wronged." Pet. App. 25.

7. The court of appeals affirmed the district court's refusal to quash the subpoena.[2] Pet. App. 1-21. The court first determined that, although the denial of a motion to quash a subpoena is interlocutory in nature, the district court's order was immediately appealable under *Perlman* v. *United States*, 247 U.S. 7 (1918), because Chief Stover had informed petitioners that he intended to turn the internal affairs file over to the grand jury rather than await a contempt citation. Pet. App. 7-8.

The court rejected the government's contention that the case had become moot because the IAU file had in fact been turned over to the grand jury. Relying on this Court's decision in *Church of Scientology* v. *United States*, 113 S. Ct. 447 (1992), the court of appeals determined that it could still afford petitioners the relief they sought by ordering that the IAU report be returned to the Department or destroyed. Pet. App. 8-9.

Turning to the merits, the court of appeals rejected petitioners' contention that mere disclosure of the IAU file to the grand jury violated their Fifth Amendment right against self-incrimination. The court noted that no officer was required to waive his Fifth Amendment privilege in responding to the IAU investigators' inquiries, and that the grand jury had not yet returned an indictment against any officer whose compelled

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[2] Observing that persons in petitioners' position "generally have the right to intervene in a pending criminal matter" (Pet. App. 5 n.1), the court of appeals proceeded to "consider the substantive bases of the [district] court's denial of [petitioners'] motions." *Ibid.*

statement had been disclosed. Pet. App. 14-16. Consequently, the court held, the officers' statements to the IAU had not been obtained or used in violation of the Constitution. *Ibid.*

Finding petitioners' concerns of potential grand jury abuse to be purely speculative, the court asserted that, if and when the grand jury returned an indictment against any of the petitioners, each indicted officer would be entitled to challenge his indictment in a hearing of the kind prescribed by this Court in *Kastigar* v. *United States*, 406 U.S. 441 (1972). Pet. App. 17. The court of appeals observed that in such a hearing, "the government will be required to prove that its evidence derives entirely from legitimate sources or that the grand jury's exposure to the officer's statement was harmless." *Ibid.* The court concluded that the right to a *Kastigar*-style hearing, along with the procedural protections employed by the government, "provides an adequate safeguard against violation of [petitioners'] Fifth Amendment rights." *Id.* at 18-19.

Finally, the court rejected petitioners' argument that, even if disclosure of the IAU file to the grand jury was not a per se violation of the Fifth Amendment, the court was obliged to require a pre-disclosure hearing at which the government would be required to demonstrate, *inter alia*, a "compelling need" for the subpoenaed material. Pet. App. 19-20. The court declined to add this "additional layer of protection" requested by petitioners, in light of its finding that existing protections were adequate. *Id.* at 20-21.

8. In November, 1994, the Albuquerque grand jury's tenure expired. The grand jury did not issue any indictments, and no subsequent grand jury investigation regarding the Klunck shooting is likely. Petitioners

filed their petition for a writ of certiorari on February 17, 1995, after the expiration of the grand jury.

ARGUMENT

1. Petitioners seek review of the court of appeals' refusal to impose additional conditions on the grand jury's use of the IAU file, and request that this Court impose an elaborate pre-disclosure hearing requirement. *E.g.*, Pet. 16, 18, 27. However, the grand jury's term has expired and the jurors have been dismissed. This Court cannot, therefore, grant the relief petitioners seek, and the case is moot. *Preiser* v. *Newkirk*, 422 U.S. 395, 401-402 (1975); see also *In re Grand Jury Proceedings* (*Jane Doe*), 863 F.2d 667, 668 (9th Cir. 1988) (appeal of finding of civil contempt for refusing to testify before grand jury was moot where term of grand jury had lapsed); *In re Grand Jury Proceedings* (*Larson*), 785 F.2d 629 (8th Cir. 1986) (same).[3]

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[3] Applying this Court's decision in *Church of Scientology* v. *United States*, 113 S. Ct. 447 (1992), the court of appeals concluded that, although the IAU file had already been turned over to the grand jury, the case was not then moot because the district court could order the grand jury to return or destroy the IAU file. Pet. App. 9. At present, however, the grand jury no longer exists and the relief that petitioners sought below cannot be granted. Additionally, the prophylactic procedural mechanism that petitioners seek in this Court (Pet. 27) cannot be provided in the absence of an ongoing grand jury investigation.

This outcome is consistent with *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983). In *Sells*, the Court found a live controversy to exist, despite prior disclosure of grand jury materials to the government, where the government sought the materials "for use in preparing and conducting a possible civil suit against respondents under the False Claims Act." *Id.* at 421-422 & n.6. In the instant case, the IAU file was sought solely for use in the grand jury's now-terminated investigation.

This case does not fall within the exception to the mootness doctrine afforded to disputes that are "capable of repetition, yet evading review." See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The grand jury at issue in this case has concluded its investigation without issuing an indictment, and there is no reasonable likelihood that a subsequent grand jury will be called to investigate the Klunck shooting. Thus, there is no "reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). See *In re Federal Grand Jury Proceedings, 89-10 (MIA)*, 938 F.2d 1578, 1580 (11th Cir. 1991) (speculation that issue might recur in a subsequent proceeding not sufficient to invoke exception to mootness doctrine); *In re Grand Jury Proceedings (Larson)*, 785 F.2d at 631 (issue not "capable of repetition, yet evading review" where no "reasonable expectation exists that [the appellant] will again be subpoenaed to testify about [the target of the investigation]").

Both courts below concluded that disclosure of the IAU file did not violate the Fifth Amendment. The court of appeals also rejected petitioners' contention that additional procedural protections were necessary. As we show below, those determinations would not warrant this Court's review in the absence of a suggestion of mootness. In such circumstances, the fact that the controversy has become moot does not provide a reason for the Court to disturb the judgment of the court of appeals. *Dove* v. *United States*, 423 U.S. 325 (1976) (per curiam).[4]

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[4] We have consistently taken the position that the Court should deny review of cases that have become moot while a petition for

2. Petitioners do not now appear to challenge the court of appeals' decision that disclosure of the IAU file to the grand jury did not violate the Fifth Amendment under *Garrity* and its progeny. Rather, they urge this Court "to revisit *Garrity* and establish procedural safeguards for use by district courts where a grand jury subpoena requests full and unsupervised disclosure of police officers' Internal Affairs statements." Pet. 12.[5]

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certiorari is pending but has not yet been granted, when such cases do not present any question that is independently worthy of this Court's review. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900) (arguing that Court should deny certiorari in moot cases that would not have warranted review on the merits); Robert L. Stern et al., *Supreme Court Practice* § 18.5, at 724 n.29 (7th ed. 1993) (discussing *Velsicol* doctrine and stating that the Court appears to follow the argument advanced in the U.S. brief in that case); but see 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10, at 432-435 (2d ed. 1984 & Supp. 1994) (disapproving *Velsicol* doctrine and stating that vacatur under *Munsingwear* is always appropriate when case becomes moot before Court grants certiorari). Petitioners have been provided a copy of the United States' Briefs in Opposition in *Velsicol*.

[5] To the extent that this request encompasses a contention that disclosure of the IAU file violated the Fifth Amendment, that contention is without merit. The court of appeals correctly determined (Pet. App. 16-17) that it is not the mere disclosure of compelled statements that implicates the Fifth Amendment right against self-incrimination, but the use of such statements to prosecute a particular declarant. See, *e.g.*, *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968) (Fifth Amendment would not be violated where an officer is compelled to answer questions relating to his duties but is not required to waive his immunity with respect to the use of his answers); *Lefkowitz* v. *Turley*, 414 U.S. 70, 84 (1973) (same). A contrary result would, for example, invalidate the use of an internal affairs report to indict someone other than the declarant, although no Fifth Amendment right would be implicated by such use.

The court of appeals correctly held that existing restrictions on the use of grand jury material are adequate to safeguard officers' Fifth Amendment rights.

The court of appeals found (Pet. App. 18-19) that the availability of a post-indictment hearing of the kind prescribed by this Court in *Kastigar* v. *United States*, 406 U.S. 441 (1972), adequately protects the Fifth Amendment right recognized in *Garrity*. Under *Kastigar*, when a defendant is indicted after making a compelled statement, the government has the burden of demonstrating "an independent, legitimate source for the disputed evidence." *Id.* at 460 (quoting *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79 n.18 (1964)). Where, as here, the grand jury does not return an indictment against the declarant, no Fifth Amendment right is implicated and a hearing is unnecessary.

The courts have encountered no difficulty in applying *Kastigar*'s hearing requirements to protect the rights identified in *Garrity*. See, *e.g.*, *In re Grand Jury Proceedings*, 45 F.3d 343, 348 (9th Cir. 1995); *United States* v. *Koon*, 34 F.3d 1416, 1431 (9th Cir. 1994), petitions for cert. pending, Nos. 94-1664 (filed Apr. 10, 1995) & 94-8842 (filed Apr. 12, 1995). Petitioners have identified no conflict in the courts of appeals on this issue or any case in which protection through a *Kastigar* hearing has been found to be inadequate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1994

STEVE NAKAMURA, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

PETITIONERS' REPLY TO WRIT OF CERTIORARI

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I. A RECENTLY DEVELOPED SPLIT IN THE CIRCUITS OVER WHETHER THE USE OF A POLICE OFFICER'S COMPELLED INTERNAL AFFAIRS STATEMENTS IN A GRAND JURY PROCEEDING VIOLATES HIS FIFTH AMENDMENT RIGHTS REQUIRES DEFINITIVE RESOLUTION BY THIS COURT.

Garrity and its progeny mandate that before a police officer's Internal Affairs statements can be subpoenaed for use by a grand jury, the district court must make a threshold finding that the officer is not a target of the grand jury investigation and that the grand jury has a clear need for any Internal Affairs statements of a non-target witness. Only by implementing such safeguards can this Court assure that the Fifth Amendment rights of police officers are protected. *Garrity v. New Jersey*, 385 U.S. 493 (1967); *see In re Grand Jury Proceedings: Kinamon*, 45 F.3d 343 (9th Cir. 1995).

Contrary to the position taken by the government in its Brief for the United States in Opposition (Response), the Officers' adamantly challenge the decision below that disclosure of their Internal Affairs statements to the grand jury did not violate their Fifth Amendment rights. (Response at 8; Petition at 19-26). Petitioners argued below and assert here that the disclosure of their Internal Affairs statements to the grand jury caused an impermissible violation of the Fifth Amendment to transpire in the grand jury's presence. (Petition at 19).

The court below rejected the Officers' claim that the production of their Internal Affairs statements for use by the grand jury violated their Fifth Amendment privileges. (App. at 14-15). In so doing, the court erroneously concluded that a grand jury investigation is not the type of criminal proceeding that implicates the Fifth Amendment or triggers the protections afforded by *Garrity*. *Id.* at 16-17. "[W]e simply have no way of knowing whether the

statements have been, or will be, used in a constitutionally proscribed manner." *Id.* at 17. In reaching this decision the court narrowly interpreted the Fifth Amendment rights of police officers and concluded that the only types of criminal proceedings protected by *Garrity* are those which follow a police officer's indictment on criminal charges. *Id.*

In direct conflict with the position taken by the Tenth Circuit in this case, the Ninth Circuit recently reversed a district court's order refusing to quash a subpoena issued to a police officer's supervisor requiring him to produce the officer's Internal Affairs statements for use in a grand jury investigation. *Kinamon*, 45 F.3d at 348.[1] Noting that pursuant to *Garrity* the Fifth Amendment shields a police officer from the use of compelled statements obtained under threat of removal from office in *any* criminal proceeding, the Ninth Circuit held:

> A grand jury is no more entitled to use a witness' immunized testimony against him to reach an indictment than is a trial jury permitted to use such testimony to reach its verdict.

Id. at 348. The court determined that a *Kastigar*-like evidentiary hearing should have been employed at some point to insure that the officer's *Garrity* rights had not been violated but left the details of conducting that hearing to the discretion of the district court. *Id.* at 348. It then

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[1] In *Kinamon*, the district court denied the police officer's motion to quash the subpoena on the grounds that the police department had no authority to grant a police officer use immunity and that a grand jury investigation was not the type of criminal proceeding that implicated a police officer's Fifth Amendment rights. *Id.* at 345-46. The district court then permitted an interlocutory appeal of its ruling prior to requiring the release of any of the police officer's compelled Internal Affairs statements. *Id.*

remanded the case to the district court with instructions to reevaluate its conclusions in light of the "correct legal position[]" that a grand jury investigation is a criminal proceeding implicating the Fifth Amendment protections provided by *Garrity*. *Id.* In light of these instructions, it is most reasonable to assume that the district court would hold the required hearing prior to the release of such statements in order to guarantee that the police officer's Fifth Amendment rights were fully protected.

The Ninth Circuit's decision in *Kinamon* is on all fours with the position asserted by the Officers here, and the relief authorized by *Kinamon* is similar if not identical to the relief sought by the Officers in this case. Plainly, the Officers' Fifth Amendment rights can be fully protected only where the district court conducts an evidentiary hearing prior to the unsupervised and blanket release of their compelled Internal Affairs statements to the government. To rely for protection on the government in an adversarial proceeding where the government is the enemy, as the Tenth Circuit clearly if mistakenly does, makes a mockery of the Officers' *Garrity* protections. (App. at 17-18).

The contradictory decisions by the Tenth Circuit in the present case and the Ninth Circuit in *Kinamon* dramatically illustrate the gulf that separates the circuits on the issue of whether a grand jury investigation is the kind of criminal proceeding which implicates a police officer's Fifth Amendment rights and for which *Garrity* and its progeny afford protection. *Kinamon*, 45 F.3d at 348; *compare United States v. North*, 920 F.2d 940, 947 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *contra In re Grand Jury Subpoenas: Stover*, 40 F.3d 1096 (10th Cir. 1994). To protect against continuous and recurring violations of the Officers' Fifth Amendment rights, the Officers have requested this Court to adopt the simple and reasonable

expedient of requiring the grand jury prosecutor to certify that any police officer whose Internal Affairs statements have been subpoenaed for grand jury use is not a target of that grand jury investigation. (Petition at 24). In addition, because prosecutors cannot always know for certain whether a non-target officer will later become a target based on information discovered in his Internal Affairs statements, the Officers have also requested this Court to require an evidentiary hearing to determine the grand jury's actual need for the subpoenaed information. The Officers have requested these reasonable and common sense procedures to preserve the "rational accommodation" of policy interests and constitutional rights recognized by *Garrity*. (Petition at 27-28).

Because "a grand jury is no more entitled to use a witness' immunized testimony against him to reach an indictment than is a trial jury permitted to use such testimony to reach its verdict" the procedural protections requested by the Officers are to the grand jury investigation what the *Kastigar* protections are to a trial. *Kinamon*, 45 F.3d at 348 (Petition at 26). Both proceedings are criminal in nature. *Id.* Thus, the Fifth Amendment jurisprudence developed by this Court in *Garrity* and its progeny demands that an indictment, like a verdict, be arrived at free from the use of police officers' compelled Internal Affairs statements. *Id.*

II. THE CONCLUSION OF THE GRAND JURY INVESTIGATING KLUNCK'S SHOOTING HAS NOT RENDERED THIS CASE MOOT BECAUSE THIS COURT CAN GRANT EFFECTUAL RELIEF NAMELY THE RETURN OR DESTRUCTION OF THE INTERNAL AFFAIRS STATEMENTS IN POSSESSION OF THE GRAND JURY.

A. Under this Court's recently established test in *Church of Scientology of California v. United States*, 113 S. Ct. 447 (1992), this case is not moot because this Court can order that the grand jury's copies of the Internal Affairs statements be either returned or destroyed.

In its Response, the government argues that this case is moot because the grand jury investigation of the Peter Klunck shooting has concluded rendering it impossible for this Court to grant the Officers effectual relief. (Response at 7). In addition, the government argues that this case does not fall within the "capable of repetition, yet evading review" exception to the mootness doctrine. (Response at 7, *citing Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976)). The government is mistaken on both points.

To begin with, the case is not moot because this Court can still grant real relief to the Officers. In *Church of Scientology of California v. United States*, 113 S. Ct. 447 (1992) this Court established an explicit test for mootness in the context of subpoenas or summons and has overruled the cases cited by the government. Specifically, the Court held that a case is rendered moot only when an event occurs that "makes it impossible for the Court to grant 'any effectual relief whatsoever' to a prevailing party." *Church of Scientology*, 113 S. Ct. at 449 *quoting Mills v. Green*, 159 U.S. 651 (1895). *Church of Scientology* involved an IRS summons to a state court clerk for two

tape recordings. The clerk had complied with the summons by the time the appeal was considered by the Ninth Circuit. The Ninth Circuit dismissed on mootness grounds and this Court reversed. In a unanimous decision authored by Justice Stevens the Court wrote, "[t]his case is not moot because if the summons were improperly issued or enforced a court could order that the IRS' copies of the tapes be either returned or destroyed." 113 S. Ct. at 451.

Relying upon this Court's decision in *Church of Scientology*, the court below applied the correct standard and concluded that it could still afford the Officers "some modicum" of the relief they sought by ordering the return or destruction of the Internal Affairs files. (App. at 8-9). The fact that the grand jury has since concluded its investigation into the Peter Klunck shooting does not change the correctness of the Tenth Circuit's decision. Applying the *Church of Scientology* test, there is no question that this Court can fashion effective relief for the Officers by ordering the return of all Internal Affairs statements to the Albuquerque Police Department Internal Affairs office, or to the Officers themselves, or by ordering that all such disclosed documents be destroyed.[2]

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[2] It would be particularly unfair to apply the mootness doctrine in a situation where, as here, a third-party record custodian had been compelled to disclose the material. The doctrine developed by this Court in *Perlman v. United States*, 247 U.S. 7 (1918) provides that a discovery order directed to a disinterested third-party is treated as an immediately appealable final order because the third-party lacks a sufficient stake in the proceeding to risk contempt by refusing compliance. *See* generally, 15B C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3914.23, pp. 156-167 (2d ed. 1992). It would be absurd to hold, as the government urges here, that each time a third-party produces the subpoenaed material and the grand jury uses the material and concludes its investigation prior to

Here the Officers urge the Court to protect their Internal Affairs statements, given under the Fifth Amendment privilege extended them by *Garrity* and its progeny. There is no logical, legal or policy distinction that can be made in failing to afford the mootness analysis established in *Church of Scientology* to this case. The placement of the Officers' Internal Affairs statements in the hands of federal prosecutors and successive grand juries, is a continuing Fifth Amendment violation. These actions have disturbed the rational accommodation of policy interests and constitutional rights protected by *Garrity* and its progeny. Increasingly, appellate courts have begun to recognize that the very use by the grand jury of such statements causes a Fifth Amendment violation to transpire before the grand jury. *Kinamon*, 45 F.3d at 348; *Weaver v. Brenner*, 40 F.3d 527, 535 (2nd Cir. 1994); *United States v. North*, 920 F.2d at 947; *United States v. Beery*, 678 F.2d 856, 860 (10th Cir. 1982). That Fifth Amendment violation is no less profound than the Fourth Amendment violation (right to privacy) recognized in *Church of Scientology*, 113 S. Ct. at 450.

Nor is it significant that the Officers never specifically requested the District Court to order the return or destruction of the records. Such a technical prerequisite to fashioning appropriate relief is not endorsed in *Church of Scientology* nor in cases extending relief to individuals whose rights have been implicated by grand jury subpoenas. *See, e.g., In re Grand Jury Proceedings: Vargas*, 723 F.2d 1461 (10th Cir. 1983). In fact, these cases typically develop where the interested person has no control over the materials themselves, and the materials are disclosed

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the conclusion of the appeal, the parties whose rights are at stake must accept dismissal of their appeal as moot, although entitled to intervene and appeal under the *Perlman* doctrine.

after the District Court proceedings have ceased and an appeal is already under way. That was the very factual setting in *Church of Scientology*. 113 S. Ct. at 449 ("while the appeal was pending, copies of the tapes were delivered to the IRS."). It is unfair to require the Officers to have been clairvoyant and anticipate all possible eventualities regarding the disclosure of the materials. They moved that the subpoena be quashed and raised the legal argument that their *Garrity* rights were being violated. To ask for more would exalt form over substance. Here, the Officers asked that the subpoenas be quashed. That request, as this Court implicitly recognized in *Church of Scientology*, was enough to preserve their right to later request that the records be returned once disclosure was made.

B. The issues raised here are capable of repetition, yet evading review and should be considered by this Court.

Contrary to the government's claims, this case fits squarely into the mootness exception known as "capable of repetition yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 148-149 (1975); *see also Roe v. Wade*, 410 U.S. 113, 125 (1973); *In re Grand Jury Proceedings: Doe*, 863 F.2d 667 (9th Cir. 1988); *In re Grand Jury Proceedings: Larson*, 785 F.2d 629 (8th Cir. 1986). This Court requires that two elements be satisfied to bring a case within this exception: (1) whether the challenged action was too short to be fully litigated prior to being rendered moot, and (2) whether there is a reasonable expectation that the same complaining party could be subjected to the same type of action again. 423 U.S. at 148.

Here, the Officers faced a rapidly moving grand jury subpoena disclosure attempt, a circumstance that did not afford an opportunity to fully litigate their interests prior

to compliance by the records custodian. As the court noted in *Larson*, "a grand jury's term and its investigations are by their very nature of limited and relatively short duration" so that issues " 'could not, or probably would not, be able to be adjudicated while fully "live." ' " 785 F.2d at 631, *citing Dow Chemical Co. v. EPA*, 605 F.2d 673, 678 n.12 (3rd Cir. 1979). The *Larson* court found that the first prong of the mootness exception had been met but concluded that the second prong remained unsatisfied because the appellants did not have a reasonable expectation of again being subpoenaed to testify before a grand jury in the same type of action. *Id.*

Unlike the appellants in *Larson*, this case satisfies both prongs of the mootness exception. These Officers are frequently interviewed by IAU investigators in connection with incidents where police officers discharge their weapons. Commonly, these incidents result in criminal investigations. Therefore, unlike the appellants in *Larson*, the Officers have a real and very reasonable expectation that they will again by subpoenaed to testify in the same type of action. *See In re Grand Jury Proceedings: Doe*, 863 F.2d at 669.

This case presents a situation similar to the one presented to the Court in *Roe v. Wade*. There, the Court found that the normal 266-day gestation for pregnancy created a situation where the pregnancy would come to term, rendering the petitioner's assertion of her constitutional rights moot before the usual appellate process was complete. *Roe*, 410 U.S. at 124. The Court explained that because pregnancy "often comes more than once to the same woman" it "provides a *classic justification* for a conclusion of nonmootness. It truly could be 'capable of repetition yet evading review.' " *Id.* (citation omitted, emphasis added). Like the situation at issue in *Roe*, this case provides a similar "classic justification for conclusion of

nonmootness." It is probable, even inevitable, that the Officers' Internal Affairs statements will again be the subject of subpoenas by a federal or state grand jury. Those subpoenas are directed to the custodians of Internal Affairs records and not to the Officers themselves. Without a resolution of the substantive issues presented by their claims, the Officers will be caught on a legal merry-go-round of subpoenas issued to custodians who are not willing to resist compliance, but whose actions render the Officers' efforts to vindicate their *Garrity* rights moot by turning over the records to the requesting authority.

CONCLUSION

For these reasons and each of those set forth in the Petition, the Officers request this Court grant their Petition for Writ of Certiorari and address the merits of the Officers' claims to clarify the scope of the protections afforded by *Garrity* and its progeny and to resolve the split in the circuits regarding at what stage of the criminal process those protections are called into play. The Officers further request that the Court implement the simple procedural safeguards they request in order to preserve their Fifth Amendment rights and to protect the integrity of the grand jury process.

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